STATE OF MICHIGAN

IN THE SUPREME COURT

MARY A. DONOHO,

Plaintiff-Appellee,

v

WAL-MART STORES, INC. and **INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA,**

Defendants-Appellants.

_____/

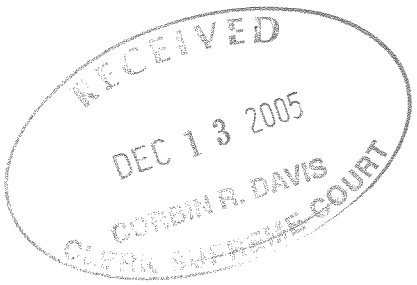
Supreme Court No.: 127537

Court of Appeals No.: 256525

Lower Court No.: 03-000235

127537

BRIEF AMICUS CURIAE IN OPPOSITION TO APPLICATION FOR LEAVE TO APPEAL



Ronald D. Glotta (P14061)
Sean C. Shearer (P55712)
Counsel for amicus curiae
Michigan Trial Lawyers Association
220 Bagley Avenue, Suite 808
Detroit, Michigan 48226
(313) 963-1320

TABLE OF CONTENTS

INDEX OF AUTHORITIES

CASES

STATUTES

STATEMENT OF BASIS FOR JURISDICTION

The order of the Workers' Compensation Appellate Commission entered in *Donoho v Wal-Mart Stores, Inc.*. 2004 Mich ACO 142, lv denied unpublished order of the Court of Appeals, decided on October 29, 2004 (Docket no. 256525), may be review by this Court pursuant to MCR 7.301(A)(2), MCR 7.302(C)(2)(a) and MCL 418.861a(14).

STATEMENT OF ISSUE PRESENTED

DOES MCL 418.315(1) CLEARLY AND UNAMBIGUOUSLY ALLOW FOR PRORATION OF ATTORNEY FEES BETWEEN EMPLOYEES AND EMPLOYERS?

Plaintiff-Appellee says "Yes"

The Board of Magistrates says "Yes"

The Workers' Compensation Appellate Commission says "Yes"

The Court of Appeals denied Defendants' Application for Leave to Appeal

Defendants-Appellants say "No"

STATEMENT OF FACTS

Mary A. Donoho (Plaintiff-Appellee) was an employee of Wal-Mart Stores, Inc. (Defendant-Appellant) who was injured while in the course and scope of her employment and subsequently incurred reasonable and necessary medical expenses in connection with the injury. Defendants wrongfully refused to pay for these medical benefits and were ordered to pay the benefits along with penalties and attorney fess after a hearing before a Magistrate.

Defendants filed an appeal with the Workers' Compensation Appellate Commission arguing that MCL 418.315(1) did not allow for an award of attorney fees as part of the expenses claimed by Plaintiff. The Defendants' argument was unsuccessful and the Commission upheld the Magistrate's order.

Defendants subsequently filed an Application for Leave to Appeal with the Court of Appeals. The Application was reviewed and leave to appeal was denied.

Defendants now seek leave to appeal with this Court.

ARGUMENT

I. MCL 418.315(1) CLEARLY AND UNAMBIGUOUSLY ALLOWS FOR PRORATION OF ATTORNEY FEES BETWEEN EMPLOYEES AND EMPLOYERS

Amicus submits this Brief to clarify the issue presented to this Court. Namely, that the Workers' Disability Compensation Act (the Act) imposes the payment of attorney fees upon an employer who "fails, neglects or refuses" to pay for reasonable and necessary medical costs. The language contained within the Act clearly and unambiguously expresses the intent of the legislature and has been accordingly and precisely followed for many years. There is no reason for this Court to adopt a position which calls for a radical departure from years of correct judicial analysis.

At issue in the case at hand is MCL 418.315(1), a portion of the Workers' Disability Compensation Act requiring the payment of reasonable and necessary medical benefits for injured employees. Specifically, the statute provides a remedy should an employer wrongfully refuse to pay these benefits. The statute itself is clear:

> "If the employer fails, neglects, or refuses so to do, the employee shall be reimbursed for the reasonable expense paid by the employee, or payment may be made in behalf of the employee to persons to whom the unpaid expenses may be owing, by order of the worker's compensation magistrate. The worker's compensation magistrate may prorate attorney fees at the contingent fee rate paid by the employee." MCL 418.315(1)

The term "expenses", as used in the statute, includes not only the amount of medical benefits which may have been paid or remain owing, but also includes the legal expenses a Plaintiff must incur in connection with the collection of and/or reimbursement for same. MCL 8.3a states:

> "All words and phrases shall be construed and understood according to the common and approved usage of the language".

The common and ordinary meaning of the word "expense", is defined as: "Something paid out to attain a goal or accomplish a purpose", *The American Heritage Dictionary* 477 (Houghton Mifflin Co. 1985). The term "expense" bears no special or peculiar meaning under the law. It is clear that the employee who has his or her medical benefits wrongfully withheld suffers doubly. Not only must the employee deal with the medical bill(s) in question, but must also incur the additional expense of retaining counsel to secure payment of the medical bill(s).

The meaning of the term "expense" can also be determined from prior case law dealing with MCL 418.315(1). Of particular note is the case of *Boyce v Grand Rapids Asphalt Paving Co,* 117 Mich App 546, 324 NW2d 28 (1982). In *Boyce*, the Court of Appeals held:

> "where the employer or its insurance carrier is guilty of a breach of the statutory duty to provide medical care or to pay for medical care in a timely fashion then the employer or its carrier, and not the employee, should bear the burden of the attorney fees. As a matter of policy, where an employer or an insurance carrier refuses to pay mandatory medical benefits, justice would be served by requiring the employer or the insurance carrier to pay the attorney fees of plaintiff's counsel." *Boyce, supra 552.*

Subsequent decisions accordingly and correctly followed this line of reasoning. In *Zeeland Community Hospital v Vander Wal*, 134 Mich App 815, 351 NW2d 853 (1984), the Court determined that:

> "Since the clause concerning attorney fees follows the clause concerning the employer's refusal to pay the employee's reasonable medical expenses, the final sentence is logically construed to require either the employer or the insurance carrier to pay a portion of defendant's attorney's fees." *Zeeland, supra 824.*

Defendant requests this Court to adopt the position of Commissioner Leslie in the case of *Stankovic v Kasle Steel Corporation*, 2000 Mich ACO 437, which states: "To the extent that the employee paid for the medical expenses he or she owes the fee." This

clearly shows that Commissioner Leslie erroneously interpreted the term "expenses" in the Act to be limited to "medical expenses" only. This improper addition of an adjective to the term written in the statute predictably leads to an incorrect conclusion.

Defendant argues that strict interpretation of the Act is at odds with legislative intention, but is once again incorrect as the strict interpretation of the Act is shown to be consistent with legislative intent. This is made clear in *Worker's Compensation in Michigan: Law and Practice*, Welch (Institute of Continuing Legal Education, 3rd Ed), 24-10, 11:

> "The last sentence of 315(1) clearly indicates that the legislature intended to allow the magistrate to order that an attorney fee be prorated between the employee and someone else. If *Boyce* stands for the proposition that the "someone else" cannot be the provider of medical services, the only other alternative is the employer. Furthermore, the language that the court found troublesome in Rule 14(5) was eliminated in 1979. Thus...it can be argued that the employer should be held responsible for the plaintiff's attorney fees that are reimbursed to a medical provider."

Defendant requests this Court to ignore years of prior, consistent interpretation of the Act and follow the view that was expressed in *Stankovic*. However, it has been shown that this view is based upon the erroneous interpretation of the word "expense" to be limited to "medical expenses". The improper addition of an adjective to a clear and unambiguous word within the Act evinces an obvious desire to engage in an act of judicial activism and circumvent not only the legislative intent of the Act, but also the clear language contained therein. Plaintiff requests that this Court deny Defendant's request and thereby affirm prior case law, legislative intent and the strict interpretation of the Worker's Disability Compensation Act.

REQUEST FOR RELIEF

Amicus curiae Michigan Trial Lawyers Association requests that the Court deny the Application for Leave to Appeal.

Respectfully Submitted,

GLOTTA & ASSOCIATES, P.C.

By: _____
Ronald D. Glotta (P14061)

_____
Sean C. Shearer (P55712)

Counsel for amicus curiae
Michigan Trial Lawyers Association
220 Bagley Avenue, Suite 808
Detroit, Michigan 48226
(313) 963-1320

Dated: December 4, 2005

STATE OF MICHIGAN
IN THE SUPREME COURT

MARY A. DONOHO

Plaintiff-Appellee,

-vs-

WAL-MART STORES, INC. and INSURANCE COMPNAY OF THE STATE OF PENNSYLVANIA,

Defendants-Appellants.
_____/

Supreme Court No.: 127537

Court of Appeals No. 256525

Lower Court No.: 03-000235

PROOF OF SERVICE

STATE OF MICHIGAN)
:SS
COUNTY OF WAYNE)

MONICA CHOICE, being duly sworn, deposes and says that she is employed by GLOTTA & ASSOCIATES, P.C., and that on the 12th day of December, 2005, she did serve a copy of BRIEF AMICUS CURIAE IN OPPOSITION TO APPLICATION FOR LEAVE TO APPEAL on:

DAVID M. STEWART, ESQ.
142 W. SECOND ST., STE. 102
FLINT, MI 48502

JON D. VANDER PLOEG, ESQ.
250 MONROE AVE
200 CALDER PLAZA BUILDING
GRAND RAPIDS, MI 49503-2251

MARTIN L. CRITCHELL, ESQ.
30700 TELEGRAOH RD, STE. 2580
BINGHAM FARMS, MI 48025

by enclosing same in an envelope properly addressed as above, and by depositing said envelope in the United States mail with postage fully prepaid thereon.

Monica Choice
MONICA CHOICE

Subscribed and sworn to before me
this 12th day of December, 2005.

Mattie Rias
Notary Public/Mattie Rias
County of Wayne/Michigan
My Commission expires: 9/24/2011

LAW OFFICES OF
GLOTTA,
&
ASSOCIATES, P.C.
:20 BAGLEY AVENUE
SUITE 808
:TROIT, MI 48226-1409
313/963-1320
FAX 313/963-1325